BANK BUMIPUTRA (M) BHD.

v.

KREDIN SDN. BHD. & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. C3843]
27 MAY 1988

CIVIL PROCEDURE: *Application to set aside default judgment entered under O. 14 RHC - Defendant deliberately allowed summary judgment to be taken against him - Delay in filing application to set aside - Explanation needed - Whether there is a defence on the merits - Principles applied in setting aside default judgment.*

The writ was served on the defendants in 1985. After appearance O. 14 proceedings were commenced against both the defendants. At the hearing of the Summons both the defendants (and their solicitors) although served were absent and the plaintiff entered judgment against both the defendants. In November, 1986 the plaintiff served s. 218(2)(a) of the Companies Act Notice on the first defendant. Also in November 1986 the second defendant was served with a Bankruptcy Notice. In March 1987, the defendants filed their application to have the judgments entered against them in their absence set aside.

Held:

[1] Order 14 r. 11 of the RHC empowers the Court to set aside judgment entered under O. 14 given against a party who does not appear at the hearing. However r. 11 cannot be invoked successfully where the defendant had directed his mind to the application and had deliberately decided to allow summary judgment to be taken against him.

[2] The Court should not and will not entertain an application after a lapse of 14 months from the defendants allowing judgment to be entered unless an acceptable explanation for the inordinate delay is given.

[3] The defendants cannot succeed in this application because they have not been able to show that they have a defence on the merits.

[The application was dismissed with costs.]

Legislation referred to:
Companies Act 1965, s. 218(2)(a)
National Land Code 1965, s. 268
Rules of the High Court 1980, O. 14 r. 2

JUDGMENT

VC George J:

The writ was served on the defendants, sometime in August on one and in early September on the other, in 1985 and after appearance O. 14 proceedings were commenced against both defendants. The summons came on for hearing on 23 January 1986. The claim against the 1st defendant was in respect of money advances by way of a loan the plaintiff Bank had made to it and interest and costs and against the second defendant as guarantor of the first defendant for the repayment of what was due to the Bank. Both the defendants (and their solicitors) although served, were absent and the plaintiff obtained liberty to enter judgment against both the defendants pursuant to which, judgment dated 23 January 1986 was entered against each of the defendants.

In November 1986 the plaintiff served a statutory notice pursuant to s. 218(2)(a) of the Companies Act on the first defendant demanding the amounts due under the judgment. It was also in November 1986 that the plaintiff served a Bankruptcy Notice on the second defendant based on the amount due under the judgment. In spite of those notices nothing was seen to be done by either of the defendants in respect of the notices; until 14 March 1987 when each of the defendants filed their application to have the judgments entered against them (in their absence) to be set aside.

The defendants' explanations for their having allowed O. 14 judgment to be entered against them without opposing it was that their then solicitors had advised them that they had no defence to the plaintiff's claim. They say that after the s. 218(2)(a) notice and the Bankruptcy Notice had been served on each of them respectively they consulted other solicitors who have advised them that in fact they had a defence to the action.

Order 14 r. 11 of the RHC allows the Court to set aside a judgment entered under O. 14 given against a party who does not appear at the hearing. However, in my view, r. 11 cannot be invoked successfully where the defendant had directed his mind to the application and had deliberately decided to allow summary judgment to be taken against him. Having in effect conceded to the right of the plaintiff to enter summary judgment against him, normally he would not be allowed to invoke r. 11 to have the judgment set aside. It is as if a consent judgment had been entered and it seems to me that unless a defendant can bring the matter more or less within the terms in which a consent judgment can be set aside, he would not succeed in his application. The position could be different as other considerations would apply if judgment was allowed to be entered by inadvertence or a misappreciation of the position. However, in the context, that a defendant permitted default judgment to be entered against him on erroneous advice of a solicitor does not come under the category of inadvertance or even a misappreciation of the position. In any event the Court should not and will not entertain such an application after a lapse of 14 months from the defendants allowing judgment to be entered unless an acceptable explanation for the inordinate delay is given. It must be remembered that even an application to set aside for irregularity has to be made within a reasonable time (see O. 2 r. 2) and it must be even more so where the application is to set aside an order that was regularly obtained. Here the defendants have not come up with any acceptable explanation as to the delay.

Even if I am wrong in what I have stated to be the approach the Court should take in an O. 14 r. 11 application of this type there is one other and more telling reason why each of these defendants cannot succeed in this application and that is that they have not been able to show that they have a defence on the merits.

A proposed statement of defence was exhibited to the affidavit enclosure (30) filed in support of the O. 14 r. 11 application.

Apparently as security for repayment of the loan the first defendant had provided the Bank with a third party second charge on certain lands in Klang; the first charge thereon being a favour of another bank. In effect the first part of the defence is that the plaintiffs are estopped from suing the defendants until they have foreclosed because of any one of the following three reasons:

(i) the plaintiffs accepted as security for the loan given to the first defendant the second charge on the lands in Klang as a full and final recourse and idemnity in respect of the loan.

(ii) the guarantee by the second defendant was ancillary to the security provided by the second charge.

(iii) the plaintiffs had accepted the security in accord and satisfaction of the loan.

The other part of the defence is that having issued a National Land Code Form 16D Notice the defendants contend that it is harsh and unconscionable for the plaintiffs to sue. In any event the defendants contended that the first chargee of the lands in Klang had foreclosed and obtained an order for sale on 26 March 1985 and the plaintiffs although having served their 16D notice on 28 June 1985 had failed or neglected to take any further step to realise the security. This has the effect, it is contended, that the plaintiffs have lost the security and consequently the letter of guarantee by the 2nd defendant is null and void and of no effect or is discharged.

Now, s. 3.01 of Article III of the loan agreement entered into between the first defendant and the plaintiffs is as follows:

> Section 3.01 **Covenant relating to Additional Securities**
>
> In considerations of the Bank granting the Term Loan the Borrower shall, in addition to this Agreement, cause the following to be done on or before the execution of this Agreement:
>
> (a) cause UMS Industries Sdn. Bhd., a company incorporated in Malaysia with its registered office at Room 808, 8th Floor, Sun Complex, Jalan Bukit Bintang, Kuala Lumpur (herein after called "UMS") to create a second charge in favour of the Bank over the land held under State Lease 4385 Lot 17696 in the Mukim and District of Klang (hereinafter referred to as "the UMS Land");
>
> (b) cause the following person, namely Datuk Mohammed Salleh bin Mohammed Yusof (NRIC No. 2132778) to execute a guarantee in favour of the Bank for the repayment of the Term Loan and all other monies secured hereunder as well as the due performance of all the other terms and conditions herein contained.

Clause 3 of the letter of guarantee is as follows:

> 3. This Guarantee shall be without prejudice to and shall not be affected nor shall I/we (or any of us) be released or exonerated by any of the matters following:
>
> (i) Any securities negotiable or otherwise including other guarantees which you may now or any time hereafter hold from the Customer or any money hereby guaranteed.
>
> (ii) The variation exchange renewal release or modification of any such securities or the refusal of neglect to complete, enforce or assign any judgment specially or other security or instrument negotiable or otherwise and whether satisfied by payment or not.
>
> (iii) Your refusal at anytime or times and at your absolute discretion to give further advances or overdrafts to the Borrower whether with or without notice to us.
>
> (iv) Any time given or extended to the Borrower and/or any other security instruments guarantee or contract or any other indulgence granted to or compromise composition or arrangement made with the Borrower and/or any other person or persons whether with or without consent or notice to us.

It seems to me that words in the said s. 3.01 "the borrower shall in addition to this agreement cause the following to be done ..." i.e., provide a second charge on the Klang lands and provide a letter of guarantee by the second defendant read together with cl. 3 (i) of the guarantee put it beyond any argument that:

(i) the charge and the guarantee were in addition to the agreement to repay and not as a full and final recourse and indemnity,

(ii) that the guarantee was not simply ancillary to the second charge, and

(iii) that the plaintiffs had not accepted the security in accord and satisfaction of the loan.

In my judgment in the face of the said s. 3.01 read together with Clause 3(i) of the guarantee the said first part of the defence does not provide the defendants with any *bona fide* triable issue.

As to the second part of the proposed defence, contractually there is no impediment to the Bank either suing for the debt or seeking to foreclose on the security or resorting to both those remedies. The fact of the matter is that apart from issuing the 16D notice the plaintiffs have not pursued with foreclosure. Accordingly the harsh and unconsionable contention is misconceived. As to the complaint that the plaintiffs had allowed the security to be lost there is Clause 3(ii) of the guarantee by which the guarantor has expressly agreed that the neglect to enforce a security shall not effect the guarantor's liability to pay up on demand. The further fact of the matter is that the question of foreclosure proceeding by the plaintiffs could not arise as the first chargee had in fact foreclosed on the property and as has been noted had obtained an order for sale on 26 March 1985. To contend that the second charge had thereby lost the security is entirely without merit in the face of the terms of s. 268 of the National Land Code which provides for the payment of monies realised from a sale pursuant to a foreclosure action *inter alia* in respect of charges subsequent to the charge in respect of which there was foreclosure.

Also found at [1988] 2 CLJ 750